

DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

FEB 12 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

)

)

Federal-State Joint Board on
Universal Service

)

)

CC Docket No. 96-45

PETITION FOR RECONSIDERATION

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider and clarify the rules and policies adopted in the *Fourth Order on Reconsideration* in this proceeding (the "*Universal Service Fourth Reconsideration Order*") as they relate to the contribution obligations of Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees.^{1/}

WCA is the trade association of the wireless cable industry, whose members include wireless cable operators, as well as the licensees of MDS and ITFS stations that lease capacity to wireless cable operators for the transmission of video programming and ancillary services to subscribers. WCA has previously participated in this proceeding, and is generally supportive of the goal of ensuring affordable telecommunications service to all Americans that is at the heart of this proceeding. As participants in the highly-competitive video programming distribution marketplace, however, WCA's members have a vital interest in

^{1/} See *Federal-State Joint Board on Universal Service*, FCC 97-420, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72 (rel. Dec. 30, 1997)[hereinafter cited as the "*Universal Service Fourth Reconsideration Order*"].

OK

assuring that the rules and policies governing universal service support are fair and equitable to all comparable competitors.

Indeed, both Congress and the Commission have recognized the vital importance of assuring a level field of competition. When it enacted Section 254 of the Communications Act, Congress placed upon the Commission the duty to develop new universal service rules consistent with the principle of competitive neutrality.^{2/} The Commission has accordingly sought to impose the principle of competitive neutrality upon the universal service regime, noting that “universal service support should not be biased against any particular technologies.”^{3/} WCA agrees with that objective and believes that the Commission can enhance competition by assuring that, in implementing universal service, wireless cable is treated in a similar manner as its competition.

^{2/} See 47 U.S.C. § 254(h)(2)(A) (directing the Commission to “establish competitively neutral [universal service] rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.”).

^{3/} See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8802 (1997)[hereinafter cited as “*Universal Service Fund Order*”]. The Commission has ingrained the concept of technological neutrality in that principle, defining it as follows:

COMPETITIVE NEUTRALITY — Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.

A. The Commission Should Clarify That All ITFS Licensees Are Exempt From Universal Service Fund Contributions Under Section 54.703.

In response to concerns raised by ITFS licensees who sought reconsideration of the *Universal Service Fund Order*,^{4/} the Commission in the *Universal Service Fourth Reconsideration Order* agreed that ITFS licensees should be exempt from universal service contribution obligations.^{5/} Specifically, the Commission held that “the public interest would not be served if we were to exercise our permissive authority to require broadcasters, *including ITFS licensees*, that engage in non-common carrier interstate telecommunications to contribute to universal service.”^{6/} While Sections 54.703(b) and (c) of the Rules, which list the entities that are exempt from universal service contribution obligations, were revised in the *Universal Service Fourth Reconsideration Order* to specifically exclude “broadcasters,” they make no specific reference to ITFS licensees.^{7/}

Despite the statement in the *Universal Service Fourth Reconsideration Order* equating ITFS licensees with broadcasters, ambiguity exists as to whether ITFS constitutes a “broadcast” service entitled to exemption from universal service contribution obligations. While

^{4/} See America’s Public Television Stations and the Public Broadcasting Service Petition for Clarification and Exception or Waiver, CC Docket No. 96-45 (filed Sept. 2, 1997), *cited in Universal Service Fourth Reconsideration Order*, at ¶ 275 n. 810.

^{5/} See *Universal Service Fourth Reconsideration Order*, at ¶ 283.

^{6/} *Id.* (emphasis supplied).

^{7/} See 47 C.F.R. § 54.703(b) and (c) (as amended by the *See Universal Service Fund Fourth Reconsideration Order and Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 97-21, DA 98-158 (rel. Jan. 29, 1998)). The *Universal Service Fourth Reconsideration Order* added to Section 54.703(b) and (c)’s lists of exempt entities “non-profit schools, non-profit colleges, non-profit universities, non-profit libraries, and non-profit health care providers; [and] broadcasters ...” *Id.*

the functional similarities between ITFS and broadcast services are abundant,^{8/} ITFS licensees are technically not considered “broadcasters” for some purposes. For example, recently the Commission observed that ITFS is considered a “non-broadcast service” for most purposes in the context of the *Notice of Proposed Rule Making* in MM Docket No. 97-234 in which the Commission is considering, among others, the issue of using auctions to award ITFS licenses.^{9/} Yet in another on-going proceeding, the Commission recently identified ITFS as “a non-pay, non-commercial broadcast service.”^{10/} To avoid any ambiguity and to give effect to the Commission’s clear statement in the *Universal Service Fourth Reconsideration Order* exempting ITFS from universal service contributions, the Commission should clarify Sections 54.703(b) and (c) by adding ITFS licensees to the lists of exempt entities.^{11/}

^{8/} ITFS stations are intended “to transmit formal educational programming offered for credit to enrolled students of accredited schools,” for “transmitting other visual and aural educational, instructional and cultural material . . . including in-service training and instruction in special skills and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors,” and “for the transmission of material directly related to the administrative activities of the licensee.” 47 C.F.R. § 74.931.

^{9/} *See Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, FCC 97-397, at ¶ 99 (rel. Nov. 26, 1997).

^{10/} *See Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, FCC 97-360, MM Docket No. 97-217, at B-2 (rel. Oct. 10, 1997).

^{11/} If the Commission’s intent was to subsume ITFS within the new exemption for non-profit educational institutions and health care providers, WCA respectfully submits that this new category is too narrow to encompass all ITFS licensees. The Commission has for many years properly awarded ITFS licenses to entities, such as state-wide educational commissions and medical organizations, which are not themselves schools or

B. The Commission Should Modify Sections 54.703(b) and (c) To Clarify That MDS Licensees That Lease Capacity For Wireless Cable Use Are Not Subject to Universal Service Fund Contribution Obligations.

The principle of competitive neutrality also requires that, like ITFS licensees, MDS licensees that lease capacity to wireless cable operators should be exempt from universal service contribution obligations. In the *Universal Service Fund Order*, the Commission created a distinction between common carrier telecommunications providers who are subject to universal service contribution obligations and exempt video programming distributors, such as open video systems (“OVS”), cable leased access and direct broadcast satellite (“DBS”) services.^{12/} As discussed above, the *Universal Service Fourth Reconsideration Order* further clarified the universal service fund contribution obligation exemptions, adding

direct health care providers, but provide educational and instructional programming directly to schools and other locations where students receive formal education. See 47 C.F.R. § 74.932 (ITFS eligibility requirements). As such, some of those ITFS licensees do not fall within Section 54.703(b) and (c)’s exemptions for “non-profit schools, non-profit colleges, non-profit universities, non-profit libraries, and non-profit health care providers.” Thus, the Commission should clarify Section 54.703(b) and (c) to add ITFS licensees to the list of exempt entities.

^{12/} In Paragraph 781 of the *Universal Service Fund Order*, the Commission attempted to clarify what constituted the provision of “telecommunications” in the video environment by stating that:

We . . . clarify that satellite and video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services. Thus, for example, entities providing, on a common carrier basis, video conferencing services, channel service or video distribution to cable head-ends would contribute to universal service. Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services would not be required to contribute on the basis of revenues derived from those services.

Universal Service Fund Order, 12 FCC Rcd at 9176. See 47 C.F.R. §§ 54.703(b) and (c).

broadcasters to the Section 54.703(b) and (c)'s lists of exempt entities.^{13/} In so doing, the Commission gave effect to the principle of competitive neutrality, noting:

broadcasters' primary competitors for programming distribution are cable, OVS, and DBS providers. Because cable, OVS, and DBS providers are not required to contribute to universal service, the exclusion from the obligation to contribute for broadcasters will ensure that broadcasters are not competitively disadvantaged in the video distribution industry by our contribution requirements.^{14/}

Clearly, the Commission intended to exempt all video programming distributors without regard to the distribution technologies that they employ. Competitive neutrality dictates similar treatment for MDS licensees that lease capacity to wireless cable operators.

In arguments that WCA previously made in this proceeding which were not addressed in the *Universal Service Fourth Reconsideration Order*, it was pointed out that MDS licensees that lease capacity for wireless cable use are functionally equivalent to cable, OVS and DBS.^{15/} The Commission has long recognized functional equivalencies between cable (which is exempt from universal service obligations) and MDS:

Wireless cable is now similar to wired cable television in the type of programming it provides, but differs from cable in how the programming is transmitted to subscribers. Generally, a wireless cable system may be described as a microwave station transmitting on a combination of MDS and ITFS channels to numerous receivers with antennas, such as single family

^{13/} See *Universal Service Fourth Reconsideration Order*, at ¶ 283.

^{14/} *Id.* (citation omitted).

^{15/} See Letter to William Caton from Paul J. Sinderbrand, counsel to WCA, CC Docket No. 96-45 (filed Aug. 29, 1997); Reply Comments of WCA, CC Docket No. 96-45 (filed Sept. 2, 1997).

residence, apartment complexes, hotels, educational institutions, business entities and governmental offices.^{16/}

Likewise, the Commission has long recognized the functional similarities between MDS and other services, such as DBS (which is also exempt from universal service contributions), because of the broadcast characteristics of these services. For example, in its 1987 *Report and Order* in CC Docket No. 86-179, the Commission recognized that many services, including MDS “share many of the same characteristics of STV [Subscription Television] that the court found dispositive of broadcast status in the common carrier DBS and domestic fixed satellite services.”^{17/} In light of the Commission’s determination in the *Universal Service Fourth Reconsideration Order* that broadcasters that engage in non-common carrier interstate telecommunications are not required to contribute to universal service,^{18/} it would be inequitable and contrary to the principle of competitive neutrality to require universal service contributions by MDS licensees that lease capacity to wireless cable operators.^{19/}

^{16/} See *Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service; Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, 10 FCC Rcd 9589, 9593 (1995).

^{17/} See *Revisions to Part 21 of the Commission’s Rules Regarding the Multipoint Distribution Service*, 2 FCC Rcd 4251 (1987).

^{18/} See *Universal Service Fourth Reconsideration Order*, at ¶ 283.

^{19/} It is possible that, as with the case of ITFS, the Commission may have believed that its exemption for broadcasters would also cover MDS licensees. While there are numerous similarities between MDS and broadcast services, generally MDS is not technically considered a “broadcast” service.

In its determinations to exempt OVS, cable leased access and DBS service^{20/} as well as the recent clarification exempting broadcasters,^{21/} the Commission has intended that providers of video programming should not be required to contribute since they do not provide a service similar to that provided by traditional common carriers. Clearly this was the logic that lead the Commission to remark in the *Universal Service Fourth Reconsideration Order* “that broadcasters do not compete to any meaningful degree with common carriers that are required to contribute to universal service because broadcasters primarily transmit video programming, a service that is not generally provided by common carriers.”^{22/} As such, the Commission should clarify Section 54.703(b) and (c) to include MDS licensees that lease capacity to wireless cable operators to the lists of entities exempt from universal service contribution obligations.

^{20/} See *Universal Service Fund Order*, 12 FCC Rcd at 9176.

^{21/} See *Universal Service Fourth Reconsideration Order*, at ¶ 283.

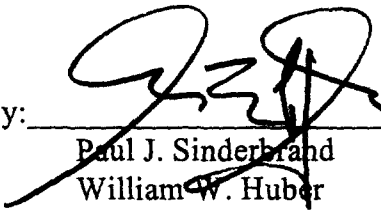
^{22/} See *id.*

For these reasons, WCA respectfully requests that the Commission clarify that MDS and ITFS licensees engaged in leasing facilities that operate across state lines to wireless cable system operators are not engaged in "telecommunications" for purposes of Section 54.703 of the Rules.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: _____


Paul J. Sinderbrand
William W. Huber

Wilkinson, Barker, Knauer, & Quinn, LLP
2300 N Street, NW
Washington, DC 20037-1128
(202) 783-4141

February 12, 1998